futures contract settlement price comes within 0.12 of the fourth highest or lowest existing exercise price.

Option Price

The contract price is payable by the buyer to the seller on exercise or expiry of the option, not at the time of the purchase. Positions are marked to market daily, as with futures positions.

List of Subjects in 17 CFR Part 30

Commodity futures, Commodity options, Foreign transactions.

Accordingly, 17 CFR Part 30 is amended as set forth below:

PART 30—FOREIGN FUTURES AND FOREIGN OPTION TRANSACTIONS

1. The authority citation for Part 30 continues to read as follows:

Authority: Secs. 2(a)(1)(A), 4, 4c, and 8a of the Commodity Exchange Act, 7 U.S.C. 2, 6, 6c and 12a.

2. Appendix B to Part 30 is amended by adding the following entry after the existing entries for the ''London International Financial Futures and Options Exchange'' to read as follows:

Appendix B—Option Contracts Permitted To Be Offered or Sold in the U.S. Pursuant to § 30.3(a)

Exchange	Type of contract	FR date and citation
* * * * *		
London International Financial Futures and Options Exchange.	Option Contract on Three-Month Eurolira (''Eurolira'') Interest Rate Futures Contract.	199___; ___ FR ___
* * * * *		

Issued in Washington, D.C. on April 14, 1995.

Jean A. Webb,

Secretary to the Commission.

[FR Doc. 95–9636 Filed 4–18–95; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 343 and 385

[Docket No. RM91–12–000]

[Order No. 578]

Alternative Dispute Resolution

Issued April 12, 1995.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing a Final Rule to implement the Alternative Dispute Resolution Act of 1990 (ADRA). To implement its policy in support of alternative dispute resolution, the Commission is amending its Rules of Practice and Procedure to add regulations adopting provisions authorized in the ADRA and to establish procedures for approving ADR in particular proceedings.

In particular, the new rules: Adopt guidelines for applying ADR techniques and definitions from the ADRA; establish procedures for submitting, reviewing, and monitoring proposals to use ADR in specific proceedings; incorporate the provisions of the ADRA regarding binding arbitration proceedings, arbitral awards, and review of arbitration results; and adopt the provisions of the ADRA regarding confidentiality in ADR proceedings established under the new rules. The Commission is also amending its Rules of Practice and Procedure to modify existing regulations and to add new regulations with respect to the submission and review of offers of settlement. Finally, the Commission is consolidating almost all of its regulations dealing with the use of ADR in oil pipeline rate proceedings into its Rules of Practice and Procedure.

EFFECTIVE DATE: May 19, 1995.

FOR FURTHER INFORMATION CONTACT: Barry Smoler, Office of the General Counsel, Federal Energy Regulatory Commission, 825 N. Capitol Street, NE., Washington, DC 20426, (202) 208–1269.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in Room 3104, 941 North Capitol Street, NE., Washington, DC 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 208–1397. To access CIPS, set your communications software to 19200, 14400, 12000, 9600, 7200, 4800, 2400, 1200 or 300bps, full duplex, no parity, 8 data bits, and 1 stop bit. The full text of this document will be available on CIPS for 60 days from the date of issuance in ASCII and WordPerfect 5.1 format. After 60 days the document will be archived, but still accessible. The complete text on diskette in Wordperfect format may also be purchased from the Commission's copy contractor, La Dorn Systems Corporation, located in Room 3104, 941 North Capitol Street, NE., Washington, DC 20426.

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Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.

I. Introduction

The Federal Energy Regulatory Commission (Commission) is issuing a Final Rule to implement the Alternative Dispute Resolution Act of 1990 (ADRA).[1] To implement its policy in support of alternative dispute resolution, the Commission is amending Subparts E and F of Part 385 of its Rules of Practice and Procedure[2] to add regulations adopting provisions authorized in the ADRA and to establish procedures for approving ADR in particular proceedings.

In particular, new Rule 604 adopts guidelines for applying ADR techniques and definitions from the ADRA and establishes procedures for submitting, reviewing, and monitoring proposals to

[1] 5 U.S.C. 571–83 (1988), *as amended by* Pub. L. 102–354, 106 Stat. 944 (Aug. 26, 1992).

[2] 18 CFR Part 385.

use ADR in specific proceedings. New Rule 605 incorporates the provisions of the ADRA regarding binding arbitration proceedings, arbitral awards, and review of arbitration results. New Rule 606 adopts the provisions of the ADRA regarding confidentiality in ADR proceedings established under proposed new Rules 604 and 605. The Commission is amending Subparts E, F, and G of Part 385 of its Rules of Practice and Procedure to modify existing regulations and to add new regulations with respect to the submission and review of offers of settlement. Finally, the Commission is consolidating almost all of § 343.5 of its regulations, dealing with the use of ADR in oil pipeline rate proceedings, into Part 385.[3]

The Commission's purpose in adopting these new rules and amendments is to provide optional opportunities for regulated entities and other parties who come before the Commission to simplify and expedite their proceedings. We stress that all of these newly authorized procedures are purely voluntary on the part of the parties affected by them, and are *in addition to* all previously authorized procedures and informal practices that parties have used or had available for use. We encourage regulated entities and other parties to try these new procedures and experiment with them. They are intended to alleviate the costs and other burdens of regulatory litigation.

The Commission will continue to seek means of further streamlining and expediting its litigatory processes, including any revisions or supplements to today's new rules that may in the future appear appropriate. We welcome suggestions on how to refine these rules after they have gone into practice.

II. Background

The ADRA amended Chapter 5 of Title 5, United States Code, by adding a new subchapter to provide explicit statutory authorization allowing federal agencies to use ADR techniques in lieu of litigation to resolve a dispute in the agency's administrative programs when all the participants to the dispute voluntarily agree to its use. ADR methods include the use of a neutral, an individual who functions to aid the participants in resolving the controversy. The ADRA provides that ADR methods may include, but are not limited to, settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, or any combination of these.[4]

The ADRA requires each agency to adopt a policy that addresses the use of alternative means of dispute resolution and case management in connection with the agency's administrative actions. The Commission will fulfill this requirement with this rulemaking proceeding and through revisions to its regulations with respect to the matters under the Commission's substantive jurisdiction.[5] As required by the ADRA, the Commission has consulted with the Administrative Conference of the United States (ACUS) and reviewed the ACUS guidance to agencies in developing their ADR policies and in implementing those policies.[6]

The Congress further encouraged the use of ADR procedures in the Energy Policy Act of 1992. Section 1802(e) of that Act directed the Commission to establish appropriate ADR procedures, including required negotiations and voluntary arbitration, early in oil pipeline proceedings as a method preferable to adjudication in resolving disputes related to rates. The Commission did so by issuing Order No. 561, Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992 on October 22, 1993.[7] Additionally, Vice President Gore's National Performance Review recommended that federal agencies expand their use of ADR techniques.

On April 17, 1991, the Commission issued a Notice of Inquiry (NOI) seeking comments on: (1) How best to implement the ADRA, (2) whether changes in the Commission's regulations are necessary or appropriate to facilitate the use of alternative means of dispute resolution, and (3) whether changes in the Commission's regulations governing settlements are necessary or appropriate.[8]

On November 10, 1994, in response to the comments on the NOI, the Commission issued a Notice of Proposed Rulemaking (NOPR).[9] The NOPR discussed at length the application of ADR to Commission proceedings. The specific proposals in the NOPR are discussed below, in the context of the comments received thereon.

In response to the NOPR, the Commission received 27 comments. The commenters are identified in an Appendix to this Final Rule, and their comments are summarized and discussed below.

III. ADR Rules

Because the use of ADR complements current settlement practices, the NOPR proposed to include the new rules in Subpart F of Part 385 of the Commission's Rules of Practice and Procedure concerning settlements. Specifically, the NOPR proposed to amend Rule 601(a) to provide for the convening of conferences to evaluate whether ADR is practicable in a particular proceeding. New Rule 604 was proposed to establish a mechanism for filing proposals to use ADR; new Rule 605 was proposed to adopt the provisions in the ADRA for binding arbitration procedures; and new Rule 606 was proposed to adopt the provisions in the ADRA for confidentiality in ADR proceedings. As the NOPR explained, the settlement rules were retained separately so that as many options as possible would be available for expediting resolution of disputes before the Commission.

EEI asks us to confirm that the new rules do not in any way preclude parties from engaging in informal settlement discussions with each other outside the scope of organized ADR activities.[10] We so confirm. We reject all suggestions by PG&E [11] that the Final Rule in any way limits or precludes settlement discussions. The Final Rule does not preclude any other form of informal discourse, negotiation or agreement among any combination of participants on any combination of issues. ADR is an additional alternative.

The NOPR explained that, apart from the provisions in proposed Rule 605 for binding arbitration proceedings, the proposed rules did not include separate provisions for the Commission's review of the ultimate outcome of an ADR proceeding. The Commission's intent is that the ultimate outcome of an ADR proceeding, like any other settlement, be subject to Commission review in a

[3] The provision implementing the statutory requirement for negotiation in oil pipeline rate proceedings remains in § 343.5.

[4] *See* Administrative Conference of the U.S., Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution (Office of the Chairman, 1987) (Sourcebook) at 44–45.

[5] Under the Department of Energy Organization Act, Pub. L. No. 95–91, 91 Stat. 565 (Aug. 4, 1988) and E.O. No. 12009, 42 FR 46267 (Sept. 15, 1977), the Chair is responsible for the administrative functions of the agency. With respect to those matters, the Commission's ADR policy has developed separately.

[6] Administrative Conference of the U.S., The Administrative Dispute Resolution Act: Guidance for Agency Dispute Resolution Specialists (Office of the Chairman, 1992).

[7] 58 FR 58753 (Nov. 4, 1993), III FERC Stats. & Regs. Preambles ¶ 30,985; *order on reh'g*, Order No. 561–A, 59 FR 40243 (Aug. 8, 1994), III FERC Stats. & Regs. Preambles ¶ 31,000 (July 28, 1994).

[8] 56 FR 18789 (Apr. 24, 1991), IV FERC Stats. & Regs. Notices ¶ 35,523 (1991).

[9] 59 FR 59,715 (November 18, 1994), IV FERC Stats. & Regs. Preambles ¶ 32,510.

[10] EEI at 3.

[11] *See* PG&E at 3–5.

manner that conforms with the Commission's statutory duties using existing procedures for evaluating settlements. As with the outcome of any settlement, the Commission's approval of the outcome of the ADR method used in a particular proceeding will not constitute approval of, or precedent regarding, any principle or issue in that proceeding. To the extent ADR techniques are used to resolve issues in licensing or certificate cases, that resolution will become part of the Commission's evaluation of any license or certificate that might be issued.

The commenters generally support the use of ADR.[12] The Industrials, noting that section 11 of the ADRA provides for an October 1, 1995 sunset provision, ask us to clarify whether the Commission intends for new Rules 604, 605 and 606 to expire on that date.[13] The Missouri PSC suggests a ''sunset review'' within ''the next two to four years.'' [14]

If and when the ADRA expires, the Commission will review the continued legal viability of the binding arbitration provisions. The other provisions are all independently sustainable, absent ADRA, under the Commission's own organic statutes. All of the Commission's regulations are in any event reviewable at any time to determine whether they can be improved, just as the Final Rule herein adds improvements to previously adopted regulations, and all such regulations can and will be deleted if and when they are determined to be no longer useful or appropriate.

A. Initiating the Use of ADR

New Rule 604(a)(1) provides that participants may, subject to the limitations of subparagraph (a)(2) of that section, use ADR to resolve any issue in a pending matter as long as all of the participants agree to using ADR. The NOPR explained that, under the ADRA, any use of ADR proceedings must be voluntary on the part of the participants, and that the Commission is not willing to create different levels of participants for purposes of determining whether the participants support using an ADR proceeding. Thus, the NOPR proposed to require the unanimous consent contemplated by the ADRA.[15]

A number of commenters want to be able to use ADR procedures even if the participants are less than unanimous in requesting such use.[16] Two commenters support the requirement for unanimous request before ADR procedures can be implemented.[17]

Commenters who oppose the requirement for unanimous consent contend that one reluctant participant ought not to be able to frustrate the ability of everyone else in the case to use ADR procedures to resolve their disagreements. They suggest that there is a public interest in using ADR procedures under those circumstances. Some contend that only participants who have a ''substantial interest'' in the outcome of the case should be able to, in effect, ''veto'' use of ADR; participants with an ''indirect or attenuated interest'' should not be able to preclude ADR, but should be free to ''opt out'' and pursue their own remedies. They characterize this approach as ''non-binding ADR.'' Another variation would be to sever one or more issues so as to use ADR procedures, unanimously requested, to resolve the rest of the issues. Commenters who support the unanimity requirement as proposed in the NOPR stress the importance of protecting the procedural rights of *all* of the parties to a proceeding, not just the big parties or the majority of the parties.

There is considerable merit to the positions expressed on both sides of this issue. ADR cannot work unless the users of it want it to work and want to use it. A single peripheral party ought not to be able to prevent everyone else from using ADR, but significant interests cannot be excluded. It is very difficult to codify a bright line test in the regulations. We will adopt the rule as proposed. We strongly urge all participants and decisional authorities to be flexible and creative in adapting ADR to their needs and to the facts and circumstances of particular cases, and in devising alternative procedures that facilitate informal resolution of most issues by all participants, or of all issues by most participants, while preserving the rights of non-participants to disagree.

The NOPR explained that the Commission seeks to encourage parties to consider the use of ADR as a routine part of the Commission's decision-making processes. Accordingly, the NOPR proposed to amend Rule 601(a) by adding the words ''or the use of alternative dispute resolution procedures'' to specifically provide for a conference to address the possibility of using ADR techniques. The NOPR also proposed to amend Rule 504(b)(7) to conform to the amendment proposed in Rule 601(a). As under the existing rule, a conference could be convened at any time during any proceeding.

The NOPR noted that Rule 601(b)(3) provides that the failure of any party to attend a conference convened under Rule 601(a) constitutes waiver of all objections that party may have to any order or ruling arising out of, or agreement reached at, the conference. That condition would apply as well in the context of a conference at which an agreement to use ADR was reached. Thus, Rule 601(b)(3) would operate to waive an absent party's objections to an ADR proposal reached in the conference if the conference was noticed in advance as a conference addressing the possibility of using ADR.

The Commission proposed an exception for proposals to use binding arbitration under proposed new Rule 605. In those cases, Rule 605(a)(5) would require the express consent of all interested parties to such an agreement. Thus, a party's absence from a conference under Rule 601 would not waive the party's rights to object to the use of binding arbitration under Rule 605.

The PEC Pipeline Group raises the possibility that a participant in a proceeding might seek to disrupt potentially promising settlement discussions by moving to convene a conference to discuss the use of ADR procedures or moving to consolidate proceedings for disposition of a settlement.[18] The regulatory devices in the Final Rule are intended to facilitate resolution of conflicts, not to postpone them. The Commission expects that the appropriate decisional authorities will be able to distinguish between the two and rule accordingly.

Several commenters object to the provisions that failure to attend the conference will in effect constitute waiver of any objection to the use of ADR. Interior asks us to clarify the procedures for objecting to the use of ADR. Commerce and Natural Gas Supply state that some participants may be unable to attend due to financial or

[12] *See, e.g.,* American Public Power Association; Consumers Power Company; New England Power Service; and Wisconsin Municipal Group.

[13] Industrials at 8.

[14] Missouri PSC at 6–7.

[15] As discussed below, the NOPR emphasized that under Rule 601(b)(3), any party who fails to attend a conference convened for the purpose of determining whether to use ADR waives any objection to decisions made about an ADR proposal at that conference. Thus, the unanimous consent is by those participants who choose to attend a conference convened for the purpose of determining whether to use ADR. As the NOPR indicated, there is an exception for binding arbitration proposals under new Rule 605(a)(5), which requires express consent of all parties in such a proposal.

[16] AGD at 3–4; EEI at 3–4; Electric Generation at 4–5; Northern Distributors at 1–6; ANR and CIG at 3–4; PG&E at 5–6; Transco; and Williams and Northwest at 6.

[17] Natural Gas Supply at 2; Natural Gas Clearinghouse at 8–9.

[18] PEC Pipeline Group at 7–8.

logistical constraints, or schedule conflicts. Commerce requests that telephone conferences be permitted, and that written objection be accepted upon a showing of good cause for inability to object in person. Supply and EEI would make written objection as effective as personal objection without a showing of good cause for failure to attend in person.[19] All of these commenters stress the importance of receiving timely and accurate notice of the conference.

Rule 601(b)(1) already requires that the participants be given notice of the time and place ''of the conference'' and ''of the matters to be addressed at the conference.'' We encourage the decisional authorities to make every effort to accommodate the financial, logistical and schedule conflict needs and constraints of the participants, and to be flexible and creative in setting the time, place and format of the conference, including use of telephone or video communication (as that technology becomes more widely available). We do, however, want the participants to make a meaningful effort to communicate with each other, even if only for the purpose of engaging in a dialogue over why they are or are not willing to consider use of ADR procedures to resolve their differences. Therefore, we will not allow participants to block the use of ADR procedures by mailing in a written objection without any discussion with other participants about whether ADR might or might not be useful.

B. Mechanism for Using ADR

Existing Rule 603 provides procedures for the parties or the Commission to incorporate the use of settlement negotiations in Commission proceedings, while existing Rule 602 provides procedures for the submission and review of written offers of settlement at any time during a proceeding. New Rule 604 provides similar procedures by which participants can use any other ADR method. The mechanism consists of the filing and review of a proposal to use a particular ADR method.

The ADRA lists six factors for an agency to consider when identifying cases in which the use of ADR would not be appropriate. The NOPR proposed to adopt these factors in subparagraph (a)(2) of Rule 604 and to require that they be considered whenever a proposal to use ADR is made. Thus, the new rule provides that the appropriate decisional authority will consider not using ADR if: (1) A definitive resolution is required for precedential value; (2) the matter involves significant questions of policy requiring additional procedures before final resolution; (3) maintaining established policy is of special importance; (4) the matter significantly affects persons or organizations who are not parties to the proceeding; (5) a full public record of the proceeding is important and the record cannot be provided by dispute resolution; or (6) the Commission must maintain continuing jurisdiction over the matter and dispute resolution would interfere with the Commission's authority to alter the disposition of the matter if circumstances change.

The use of ADR when any of these factors is present is not absolutely prohibited under the rule. New Rule 604(a)(3) provides that ADR may be used if the dispute resolution proceeding can be structured to avoid the identified problem or if other concerns significantly outweigh one or more of the factors.

New Rule 604(a)(4) incorporates the ADRA's provision that the agency's decision to use or not to use an ADR proceeding is not subject to judicial review. New Rule 604(a)(5) provides that settlement agreements reached through the use of ADR will be subject to Rule 602, notice and comment procedures, unless the decisional authority, upon motion or otherwise, orders a different procedure.

Rule 604(b) incorporates various ADRA definitions. ''Party'' and ''participant'' are defined in Rule 102.[20] While staff is not included in the definition of ''party,'' it is a ''participant.'' The proposed rules provide for the full participation of parties and staff in the ADR process to the same extent as in the settlement process.

The NOPR explained that the definition of participant in Rule 102 does not expressly identify the additional entities that are permitted to participate in the application procedures in the Commission's rules for a license or exemption to construct, operate, and maintain a hydroelectric project. To ensure that all participants in such hydroelectric proceedings also may participate in any matters concerning ADR under Subpart F of the Commission's regulations, the Commission proposed to adopt a definition of ''participant'' in Rule 604(b)(8) that includes these entities, which may be state and federal agencies and Indian tribes having statutory roles or a direct interest in the hydroelectric proceedings, as participants in ADR proceedings.

New Rule 604(e)(1) permits the participants to submit a written proposal at any time during a proceeding to use ADR to resolve all or part of any matter in controversy or anticipated to be in controversy in the proceeding. The proposal should be written to avoid procedural disagreements during the ADR proceeding. A written proposal also is needed by the decisional authority to determine the appropriateness of using ADR in the proceeding and whether to suspend action on a matter to give participants the opportunity to resolve their disputes by means of an ADR process. The NOPR explained that, except for the binding arbitration process identified in the ADRA and incorporated in new Rule 605, the Commission does not intend to identify the specific ADR methods available to the parties nor to mandate specific procedures for each type of ADR, but leaves the selection and procedures to the discretion of the participants.

New Rule 604(e)(2) provides that, if a proceeding is pending before an administrative law judge (ALJ), the proposal must be filed with the ALJ. New Rule 604(e)(3) provides that, if a proposal involves binding arbitration, it must be filed with the Secretary for consideration by the Commission. For all other matters, new Rule 604(e)(4) provides that a proposal to use ADR may be filed with the Secretary, who will transmit the proposal to the appropriate decisional authority. New Rule 604(e)(6) allows the participants to modify the ADR proposal once it has been approved and provides that requests to modify must follow the same procedure as proposals for ADR.

Cinergy urges us to convene the ADR conference as quickly as possible, preferably within 20 days of the filing of the motion. We will encourage decisional authorities to expedite this process, but all potentially affected participants must be afforded ample time to consider their positions and make appropriate arrangements.

Cinergy also proposes that the proposal be deemed approved unless an order denying approval is issued within 10 days, rather than the proposed 30 days. While we encourage decisional authorities to act as quickly as possible under the circumstances presented (*e.g.*, if there is clear unanimity among participants), because of the sometimes large number of parties and need for notice, it is not practical to shorten the

[19] EEI at 4; Natural Gas Supply at 2–3.

[20] 18 CFR 385.102 (b) and (c).

period after which ADR will be deemed approved.[21]

Rule 604(c) provides that a neutral may be a permanent or temporary officer or employee of the Federal Government, (including an ALJ), or any other individual who is acceptable to the participants in an ADR proceeding. A neutral may not have any official, financial, or personal conflict of interest with respect to the issues in controversy.[22] The NOPR explained that, if a staff member serves as a neutral, in no event could that person thereafter serve in any other capacity in the proceeding.[23]

Rule 604(c)(3) provides that neutrals may be selected from rosters kept by the Federal Mediation and Conciliation Service, ACUS, and the American Arbitration Association, as well as any other source. Pursuant to proposed Rule 604(c)(2), neutrals will be selected by the participants and will serve at the will of the participants unless the ADR agreement provides otherwise.

Missouri PSC suggests that an ALJ who participates as a neutral should not participate thereafter in a decisional capacity without the written consent of all parties. The short answer is that once an ALJ or any other Commission employee has participated as a neutral in an ADR procedure, they are permanently barred from any role in the decisional process involving that case, with or without consent.

Missouri PSC also suggests that the Commission compile a roster of neutrals familiar with utility regulation. Knowledge of utility law and commercial practice would have obvious relevance to a neutral's ability to function effectively in that role, but the Commission does not wish to put itself in the position of screening and endorsing the qualifications of persons who wish to serve in that capacity. The participants should be free to choose whomever they wish, unencumbered by semi-official rosters.

The Industrials request clarification of the responsibility of the participants for compensating a Commission employee, including an ALJ, who serves as a neutral.[24] Any Commission employee, including an ALJ, who serves as a neutral does so in his or her official capacity as a federal employee and cannot properly accept any additional compensation of any kind from any participant in the proceeding. With respect to other neutrals, we agree with the Industrials that it would be useful for the participants to clarify matters of compensation in the ADR agreement.

The Industrials ask us to clarify in Rule 604 what authority the neutral has, particularly with respect to such matters as issuing subpoenas, compelling production of documents and issuing protective orders.[25] The Industrials misunderstand the role and posture of the neutral. The neutral's authority to issue orders is derived from the participants, not from the Commission. The participants, in their ADR agreement, are free to authorize or not authorize the neutral to direct production of their documents, issue protective orders, or issue any other order to which they may or may not wish to be bound. The one exception, as the Industrials themselves recognize, is that ALJ's retain all of their delegated authority as presiding officers of the Commission; selection as a neutral does not serve to in any way suspend or diminish their authority. Thus, if the participants want their neutral to exercise judicial-type authority, they can either select an ALJ to serve as their neutral or select an outsider and authorize that person to exercise whatever powers they wish to confer and by which they wish to be bound.[26]

New Rule 604(e)(5) provides for the issuance of an order by the decisional authority approving or denying a proposal filed under Rule 604 or Rule 605. The decisional authority will determine whether ADR would be appropriate for a particular proceeding on a case by case basis, using the guidelines set forth in new Rules 604(a)(2)and (3). A proposal to use ADR will be deemed approved unless the decisional authority issues an order denying approval within 30 days after the proposal is filed.

New Rule 604(f) allows the decisional authority to require status reports on the proceeding at any time. The NOPR explained that this provision is designed to prevent parties from using ADR as a stalling tactic.

New Rule 604(g) gives the decisional authority, upon motion or otherwise, the authority to terminate an ADR proceeding under Rule 604 or 605 if it appears that ADR is no longer appropriate. New Rule 604(g)(2) provides that a decision to terminate an ADR proceeding is not subject to judicial review because the decision is interlocutory in nature. This is consistent with the existing settlement negotiation procedures in Rules 603 (h) and (i). The NOPR explained that parties may seek Commission review of such a decision under Rule 715 in cases pending before an ALJ or, in all other cases, under Rule 212 as a motion for reconsideration.

Several commenters[27] ask us to define standards for terminating ADR proceedings. We prefer not to provide standards because it is not practical to attempt to anticipate in a generic rule all of the circumstances that might justify termination of such a proceeding. It is best left to case by case determination, based on the peculiar facts and circumstances presented.

EEI urges us to encourage greater use of ADR by announcing a policy of adopting whatever result the parties reach without modification unless it would contravene a statutory obligation.[28] Natural Gas Pipeline urges us to overturn the results of an ADR procedure ''only under exceptional circumstances.'' PG&E urges us to accord ''substantial deference'' to the results of ADR procedures.[29]

The Commission obviously must reserve authority to ensure that decisions reached through ADR procedures are not contrary to the public interest or inconsistent with statutory requirements. Within those broad parameters, the Commission can and will give substantial deference to whatever consensus participants reach through the ADR process.

C. Arbitration

New Rule 605 incorporates the arbitration provisions as they appear in the ADRA, with a few modifications as discussed below. The NOPR explained that, to the extent participants wish to use a different arbitration procedure, they are free to propose one rather than using the procedure set forth in Rule 605.

New Rule 605(a) provides that the participants may at any time submit a

[21] The Industrials (at 4) question what happens if the 30th day falls on a weekend or holiday. Consistent with long-established Commission practice, the time period is extended until the day after the weekend or holiday. *See* Rule 2007(a)(2).

[22] A non-governmental neutral may, however, have a personal conflict of interest provided that the conflict is disclosed to all of the participants and given that disclosure they nonetheless consent to that neutral's service.

[23] The NOPR explained that this is consistent with the Commission's current settlement procedures. Under Rule 603, the settlement judge serves a single function as a mediator or facilitator and cannot be a decisionmaker or advisor in that proceeding.

[24] Industrials at 3.

[25] Industrials at 6–8.

[26] Columbia Gas at 4 suggests adding several more words to subsection 604(c)(1), believing that they may have been inadvertently omitted. There was no omission, and the extra words are unnecessary. Columbia Gas also alleges that there is an inconsistency between subsections (c) and (e) of section 604. Although phrased differently, we believe that both subsections are clear and we do not perceive any substantive inconsistency.

[27] Northwest Users at 4–5; Electric Generation at 7. Electric Generation also urges us to aggressively monitor the status of ADR proceedings. We will monitor them as appropriate.

[28] EEI at 3.

[29] PG&E at 6–9.

proposal to use the binding arbitration provisions of Rule 605 to resolve all or part of any matter in controversy before the Commission. New Rule 605(a)(2) requires that a proposal to use binding arbitration follow the procedures outlined in Rule 604(d). New Rule 605(a)(3) requires that the proposal be submitted in writing and contain the information listed in Rule 604(e). Under new Rule 605(a)(4), the arbitration process can be monitored and terminated just as other ADR methods under Rules 604 (f) and (g). To ensure that arbitration is truly voluntary on all sides, new Rule 605(a)(5) provides that the Commission will not require any person to consent to an arbitration proposal as a condition of receiving a contract or benefit. Similarly, no company regulated by the Commission may impose such a condition. New Rule 605(a)(5) further requires that an arbitration proposal under Rule 605 have the express written consent of all parties to the dispute.

Under new Rule 605(b), the participants in an arbitration proceeding are entitled to select the arbitrator. The particular procedure to be used in selecting an arbitrator is not provided; however, the arbitrator is required to meet the requirements of the neutral as described in new Rule 604(d). Rule 605(c) sets forth the arbitrator's duties, including conducting hearings, administering oaths, and issuing subpoenas to compel attendance of witnesses and production of evidence at hearing. As explained in the NOPR, the arbitrator has the power to issue awards but not the authority to issue licenses and certificates.

New Rule 605(d) incorporates the provisions in section 579 of the ADRA that establish basic rules for the conduct of binding arbitration proceedings, including hearings. Rule 605(d)(1) provides that the arbitrator will set the time and place for the hearing and notify the participants. New Rules 605(d) (2) and (3) provide for preparation of a record, if desired, and for presenting evidence. Under new Rule 605(d)(3)(iv), the arbitrator may exclude evidence that is irrelevant, immaterial, unduly repetitious or privileged. New Rule 605(d)(4) prohibits *ex parte* communications with the arbitrator, allowing the arbitrator to impose sanctions for a violation of this prohibition. New Rule 605(d)(5) requires the arbitrator to issue an award within 30 days of the close of the hearing unless the participants and arbitrator agree to a different schedule.

New Rule 605(e) incorporates the ADRA standards for issuing and appealing arbitral awards. The award will be in writing and include a brief, informal discussion of the factual and legal basis for the award. The prevailing participants will file the award with the Commission and any other relevant agencies and serve all participants. The award becomes final 30 days after it is served on all participants. However, the Commission, upon motion or otherwise, can extend this period for one additional 30-day period upon notice of the extension to all participants. New Rule 605(e)(3) provides that a final award is binding on the participants.

Several commenters [30] ask us to clarify that the terms ''arbitrator'' and ''arbitration'' are broad enough to authorize use of a panel of arbitrators and not just a single person. We so confirm; the singular includes the plural.

CIG and ANR ask us to indicate in advance the outer range of potentially acceptable results of the arbitration.[31] It is simply impractical for the Commission to do this, because it would in effect require the Commission to partially prejudge the case before there is an adequate record on which to make such decisions. It would also defeat the purpose of inviting the parties to work out their own solution before the Commission becomes heavily involved in the decisional process.

Columbia Gas asks us to incorporate various interpretations of ADRA in the regulations.[32] ADRA speaks for itself on these matters, and we perceive no need to construe these particular statutory provisions in the regulations, or to address them in this preamble to the regulations. Contrary to Columbia Gas' suggestion, nothing in Rule 605 precludes the filing of an arbitration award with any other agency, regardless of whether such an award is also filed with the Commission. In other words, the award should be filed with whichever agency or agencies it is relevant. Also contrary to Columbia Gas' suggestion, while section 580(a)(1) of ADRA allows the Commission to omit formal findings and conclusions, it does not preclude the Commission from requiring findings and conclusions on its own authority.

In response to PEC Pipeline Group,[33] we clarify that Rule 605(a)(5) does not prevent parties to a settlement from agreeing to the use of future binding arbitration to resolve disputes under a settlement, and does not prevent parties from entering into transportation and storage arrangements that include an arbitration clause.

New Rule 605(f) provides procedures for the Commission to vacate an award. New Rule 605(f)(1) permits any person to request, within ten days of the filing of an award under Rule 605(e), that the Commission vacate the award and requires that person to provide notice of the request to all participants. Responses to such a request must be filed within ten days after the request is filed. Under new Rule 605(f)(2), the Commission, upon request or otherwise, may vacate an arbitration award before the award becomes final. New Rule 605(e) adopts the ADRA's provision that the award need only discuss informally the factual and legal bases for the award. The NOPR explained that if the participants wish to require that an award include formal findings of fact and conclusions of law, they may do so by adopting a different standard.

New Rule 605(f)(4) adopts the ADRA's provision for monetary relief. Thus, if the Commission vacates an arbitration award, a party to the arbitration proceeding may petition the Commission for an award of the attorney fees and expenses incurred in connection with the arbitration proceeding. The Commission must award the petitioning party those fees and expenses that would not have been incurred in the absence of the arbitration proceeding, unless the Commission finds that special circumstances make the award unjust. As provided by the ADRA, new Rule 605(f)(6) establishes that a decision by the Commission to vacate an arbitration award is not subject to judicial review.

Northwest Users question how extensively arbitration awards will be vacated. They contend that persons who are not parties to the proceeding should not be able to move to vacate an arbitration award, nor should such nonparties be allowed to intervene out of time for that purpose.[34] Electric Generation urges us to articulate a stringent standard for review of arbitration awards, suggesting ''manifest injustice.'' [35] Natural Gas Pipeline suggests that we confine vacature to ''exceptional circumstances.'' [36]

As AGD notes,[37] the Commission has a statutory responsibility to vacate an arbitration award if it contravenes the public interest or is in any other way inconsistent with statutory requirements. The Commission does, however, want to encourage parties to

[30] Cinergy at 3; PGC Pipeline Group at 11.

[31] CIG and ANR at 2–3.

[32] Columbia Gas at 4–6.

[33] PEC Pipeline Group at 12–13.

[34] Northwest Users at 5–7.

[35] Electric Generation at 8.

[36] Natural Gas Pipeline at 7.

[37] AGD at 4.

explore and use ADR procedures, and recognizes that extensive vacature of arbitration awards would discourage parties from using them. The Commission would be very loath to allow last minute interventions to disrupt a settlement or arbitration award after the parties have laboriously reached such a resolution. On balance, given the Commission's statutory responsibilities, decisions on vacature will necessarily have to be made on a case by case basis. We confirm for PEC Pipeline Group [38] that if an arbitration award is vacated the parties return to the *status quo ante* as if the arbitration proceeding had never occurred.

Several commenters asked us to clarify who has to reimburse whom for fees and expenses in the event that an arbitration award is vacated, and who can petition for it.[39] Electric Generation urges us to make the losers reimburse the winners.[40] The PEC Pipeline Group expresses strong opposition to the proposed rule and urges us not to adopt it.[41] The rule is required by the last sentence of section 580(g) of the ADRA, which is unmistakably clear on its face and should assuage the commenters' concerns: ''Such fees and expenses shall be paid from the funds of the agency that vacated the award.'' We have added a sentence to subsection 605(f)(4) to clarify it. All participants to the arbitration proceeding can petition the Commission for reimbursement by the Commission of the fees and expenses they incurred in the arbitration process if the Commission vacates the arbitration award at the end of that process. We confirm to the PEC Pipeline Group that parties may agree to forego the right to petition for fees and expenses, and may also agree in advance on conditions pursuant to which an arbitration award can be reviewed by the Commission.

D. Confidentiality

New Rule 606 governs confidentiality in ADR proceedings established under new Rules 604 and 605, and incorporates most of the confidentiality provisions for neutrals and participants that are found in the ADRA. Under new Rule 606(a), confidentiality must be maintained by a neutral unless: (1) All participants in the ADR proceeding and the neutral consent in writing to the disclosure; (2) the communication has already been made public; (3) the communication is required by statute to be made public; or (4) a court determines, after a balancing of considerations, that disclosure is necessary to prevent a manifest injustice, to help establish a violation of law, or to prevent harm to the public health or safety.

Under new Rule 606(b), a participant in the ADR proceeding must not disclose information concerning any dispute resolution communication unless, pursuant to five of the seven exceptions set out in the ADRA: (1) All participants consent in writing; (2) the communication has already been made public; (3) the communication is required by statute to be made public; (4) a court determines, after balancing considerations, that disclosure is necessary to prevent manifest injustice, establish a violation of law, or prevent harm to the public health or safety; or (5) the communication is relevant to determining the existence or meaning or the enforcement of an agreement or award resulting from the proceeding.

Under new Rule 606(c), any communication disclosed in violation of this section will not be admissible in any proceeding relating to the issues in controversy. New Rule 606(d) provides that the participants may agree to alternative confidentiality procedures for disclosure by a neutral, but should inform the neutral of any modifications prior to the commencement of the ADR procedure. If the neutral is not so informed, the provisions of new Rule 606(a) would apply. Under new Rule 606(e), the participants must be notified of a demand for disclosure, whether by discovery or other legal process. Proposed Rules 606(f) through (i) adopt the remaining provisions of the ADRA, including the provision that nothing in the section would prevent discovery or admissibility of evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.[42]

AGD supports the rule as proposed.[43] Cinergy suggests revisions to subsections 606(a)(4) and (b)(4); we will not make those revisions because, as proposed and adopted, those subsections directly track the language of section 574 of the ADRA.

We have made several revisions in response to the comments of the PEC Pipeline Group.[44] First, we have revised Rules 606(a)(2) and (b)(2) by inserting the word ''otherwise,'' so that they now read ''The dispute resolution communication has otherwise already been made public.'' Next, we have tightened Rule 606(c) by deleting the latter part of it, so that it now reads ''Any dispute resolution communication that is disclosed in violation of paragraphs (a) or (b) of this section shall not be admissable in any proceeding.'' Third, we have substituted the word ''participant'' for the word ''neutral'' in Rule 606(e), so that it now reads ''If a demand for disclosure, by way of discovery request or other legal process, is made upon a *participant* before the commencement of the dispute resolution communication, the *participant* will make reasonable efforts to notify *the neutral and the other participants* of the demand.'' (Emphasis added) Finally, we have added a new Rule 606(k), which reads as follows: ''Where disclosure is authorized by this section, nothing in this section precludes use of a protective agreement or protective orders.'' [45]

We have not adopted the other changes suggested by PEC Pipeline Group or by Electric Generation [46] because we do not believe they are warranted. The matters raised by Electric Generation with respect to the Freedom of Information Act are not addressed here because they are beyond the scope of this rulemaking.

IV. Settlement Rules

A. Omnibus Settlements

The NOPR explained that the authority of the ALJ and the Commission to consolidate multiple proceedings exclusively under their respective jurisdictions for review in an omnibus settlement is established, respectively, in Rules 503(a), 101(e), and 212. The NOPR proposed to codify current practice and amend Rule 503(a) by adding that the Chief ALJ may order multiple proceedings that are pending before ALJs to be consolidated for settlement, as well as hearing, on any or all matters in issue. The Commission is amending the procedures in Rule 602(b) for the submission of offers of settlement to provide specifically for requests to be filed with the Commission for consolidation or other appropriate procedural relief to enable proceedings pending before ALJs to be

[38] PEC Pipeline Group at 12.

[39] Cinergy at 3; Cig and ANR at 4; *see also* Natural Gas Pipeline at 7.

[40] Electric Generation at 8–9.

[41] PEC Pipeline Group at 10–11.

[42] The NOPR explained that existing Rule 2101 permits a participant to appear in a proceeding in person or by an attorney or other qualified representative, and that existing Rule 2102 provides for suspension or disqualification (temporary or permanent) of representatives when necessary.

[43] AGD at 4–5.

[44] PEC Pipeline Group at 14–16.

[45] New Rule 606(k) should also help alleviate the problem raised by Natural Gas Supply (at 5) with respect to protection of proprietary information related to research and development projects. We have also added to Rule 606(f) the cross-references that Natural Gas Supply requested to sections 385.410 and 388.112.

[46] Electric Generation at 9–10.

transmitted to the Commission for consideration in an omnibus settlement together with proceedings pending before the Commission. The amendment adds new paragraph (b)(3) to permit any participant in a proceeding covered by an offer of settlement submitted under (b)(1) to file a consolidation request when the settlement covers multiple proceedings pending in part before the Commission and in part before one or more ALJs.

The Industrials request that the Commission codify standards for determining when party severance would be appropriate in an omnibus settlement. In particular, they state that ''[i]n effect, we believe, the Commission should clarify its new rules providing for the severance of parties to state that severance should be by party, *by contested issue of material fact.*'' In the alternative, they ''recommend that the final rule be clarified to provide that severance of parties should proceed by docket, rather than by omnibus settlement.'' [47]

The issue of severance, generally, is discussed below. We see no reason to treat severance differently in the context of omnibus settlements than in any other context.

B. Uncontested Settlements

Rule 602(g) provides for the certification to the Commission of uncontested settlements filed with an ALJ. If an offer is uncontested, the ALJ is required under Rule 602(g)(1) to certify to the Commission the offer of settlement with the hearing record and any related pleadings. Under the standard set out in Rule 602(g)(3), the Commission may approve an uncontested offer ''upon a finding that the settlement appears to be fair and reasonable and in the public interest.''

The NOPR explained that the court in *Tejas Power Co.* v. *FERC* held that the Commission is required to make an independent determination that the settlement is in the public interest.[48] On some issues, an exercise of the Commission's independent review may be required even though the parties may not want to develop a record. In these circumstances, the Commission is entitled to require the development of an adequate record before it can determine whether an uncontested settlement is in the public interest.

AGD maintains that the Commission should amend its rules to provide that it will act on an uncontested settlement within 45 days after it is certified to the Commission. In the alternative, it asks that an uncontested settlement be treated the same way as an uncontested initial decision under Rules 708 and 712 by its becoming effective within 45 days after transmission to the Commission unless it is stayed by the Commission pending further review.[49]

Natural Gas Pipeline maintains that uncontested settlements should be deemed approved and become effective without a Commission order, absent contrary Commission action, within 30 days after the close of the comment period.[50]

While the Commission attempts as a matter of course to act on uncontested settlements as expeditiously as possible, a time constraint would not be in the public interest because some settlements, even though not contested, are complicated nevertheless. It cannot be assumed that every aspect of every uncontested settlement is consistent with the public interest and in conformity with key Commission policies. We note in this regard, however, that the Commission's goal is to act on uncontested electric and gas rate settlements within 45 days of the close of the comment period or date of certification to the Commission, and to act on contested electric and gas rate settlements within 90 days of those trigger dates. In most cases the Commission has been able to adhere to these goals, particularly with respect to the uncontested cases.

The Industrials maintain that the Commission should review, and not refashion, uncontested settlements. In addition, they claim the Commission cannot order the parties to provide more support for the settlement; they contend the Commission can only reject it or return it to the parties to decide how to fix deficiencies.[51]

The Commission is not limited to rejecting an uncontested settlement or returning it to the parties to decide how to fix it. Of course, the Commission may take both approaches. In addition, the Commission may refashion an uncontested settlement to comport with the public interest and the Commission may conclude that it is in the public interest that there be more support for all or part of an uncontested settlement.

C. Contested Settlements

Rule 602(h) provides for processing settlements that are contested in whole or in part by any participant. Rule 602(h)(1) governs the Commission's evaluation and decision of contested settlements. Rule 602(h)(2) sets out the standards that govern the ALJ's evaluation of contested settlements in proceedings before the ALJ and provides for the certification of the settlement to the Commission for a decision on the merits of the contested issues.

As discussed in the NOPR, under Rule 602(h)(1) the Commission may decide the merits of the issues in a contested settlement if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact. Under Rule 602(h)(2), a settlement that is contested by a party and that is before an ALJ may be certified to the Commission for a merits decision if, under Rule 602(h)(2)(ii), no genuine issue of material fact exists. If genuine issues of material fact exist, the ALJ may still certify the contested settlement but only if the following three conditions specified in Rule 602(h)(2)(iii) are met: (1) The parties concur on a motion for omission of the initial decision, (2) the presiding officer determines that the record contains substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues, and (3) the parties have an opportunity to avail themselves of their rights with respect to the presentation of evidence and cross-examination of opposing witnesses.

As we explained in the NOPR, the rules permit either the Commission or the ALJ, as appropriate, to sever contested issues from a settlement and resolve them separately.[52] The uncontested issues may be considered under the expedited procedures for Commission review of uncontested settlements, while the contested issues proceed with further review on the merits. In establishing the settlement rules in 1979, the Commission encouraged the parties to a settlement to indicate whether parts of the settlement are severable and to advise the ALJ or the Commission to permit a prompt decision on the uncontested parts of the settlement.[53] This Final Rule amends

[47] Industrials at 10.

[48] Tejas Power Co. v. FERC, 908 F.2d 998 (D.C. Cir. 1990). Specifically, the court found that the issues in that rate proceeding required the Commission to examine the impact of the settlement and collect evidence that the consumers' interest would be served by the agreement, that the parties had adequate bargaining power to produce an equitable agreement, and that the agreement's terms are acceptable under the Commission's requirements.

[49] AGD at 7–8.

[50] Natural Gas Pipeline at 4.

[51] Industrials at 18–21.

[52] Rule 602(h)(1)(iii) and Rule 602(h)(2)(iv). *See, e.g.*, Tennessee Gas Pipeline Co., 31 FERC ¶ 61,308 (1985), in which the Commission approved a settlement in the public interest on issues where the record was sufficient, but severed an issue for later decision where the record was insufficient.

[53] FERC Stats. & Regs. Preambles, 1977–1981 ¶ 30,061, at 30,433.

Rule 602(h)(1) (ii) and (iii) and Rule 602(h)(2)(iv) to permit the ALJ or the Commission to sever contesting parties as well, by adding the phrase ''contesting parties or'' before the discussion beginning with ''contested issues''.

Natural Gas Clearinghouse [54] maintains that contesting parties should not be involuntarily severed from contested settlements. It contends there are many reasons to reaffirm the no-severing policy of *Arkla*.[55] It argues that an exercise of raw power due to unequal bargaining power is against public policy and violates the *Tejas* decision's emphasis on adequate bargaining power.[56]

The rule merely recognizes that the Commission permits the severing of parties in certain circumstances.[57] Such a policy has been approved by the United States Court of Appeals for the District of Columbia Circuit.[58] Nothing in *Tejas* is to the contrary. *Tejas* merely dealt with the weight to be given to the settling parties' position in a contested settlement where the Commission approved the settlement for all parties. Severing a party, of course, no longer makes that party bound by the settlement.

Of course, there are no hard and fast criteria for determining whether party severing is appropriate. That decision depends on the circumstances of the particular settlement. The Commission must consider the nature of the issue or issues contested, the state of the record, and the impact of the Commission's decision on the settlement. Those factors are illustrated by the Commission's decisions in *Arkla* and *Columbia*. In *Arkla,* the Commission refused to sever contesting parties because, as there described, that would create a ''no lose'' situation for those parties, who were interruptible customers.[59] Instead, the Commission stated that it would resolve the contested issues on the merits. However, in *Columbia,* the Commission concluded that it was appropriate to sever the contesting party with respect to its firm rates, where the contesting party would not be in a ''no lose'' situation and the record was inadequate for reaching a decision on the merits. This refinement of *Arkla* enabled Columbia and the settling parties to reap the benefits of their bargain while enabling the contesting party to litigate its case.

The PEC Pipeline Group maintains that ''the Commission should abandon its sweeping prohibition against severing parties from Part 284 transportation and storage rate settlements * * * (and) clarify that severance of contesting parties is allowed in Part 284 transportation and storage rate settlements when the contesting parties have no direct economic interest in the settlement.'' [60] The Commission does permit parties to be severed in Part 284 settlements as indicated by the recent *Columbia* and *Southern* proceedings.[61] A party's lack of direct economic interest in the settlement should be considered when such a circumstance arises.

The Industrials ask the Commission to clarify ''what are the effects, if a party is severed, tries an issue such as rate design, and the outcome dictates that party is entitled to rates lower than the rates applicable to the consenting parties.'' [62] For example, they assert that the refund floor in the next rate case should be the lower of the settled or litigated result. In addition, they ask for clarification about terms and conditions, such as it is unduly discriminatory to have differing quality or pressure standards owing to a settlement and a merits decision. The Commission concludes that the Industrials' clarification requests should be considered in case-specific situations.

Under paragraph (ii) of Rule 602(h)(2), the ALJ determines whether a settlement that is contested by any participant contains a genuine issue of material fact. If the settlement does not, the ALJ may certify the settlement directly to the Commission. If the settlement contains a genuine issue of material fact, the ALJ may certify the settlement only if the three conditions under paragraph (iii) are met. The NOPR proposed to amend Rule 602(f) to require a strong showing by contesting parties detailing any genuine issues of material fact that they contend exist.

Natural Gas Clearinghouse maintains that the Commission should not require contesting parties to submit affidavits detailing genuine issues of material fact because this will encourage extensive discovery rather than produce more certifiable settlements. It submits that disciplining parties for superficial claims is a more ''surgical'' solution.[63] Other commenters support the requirement for affidavits.[64]

The Commission continues to believe that the affidavit approach is the appropriate way to ensure that genuine issues of material fact exist. This is a more efficient approach than disciplining parties at some later date. As with a motion for summary disposition, the ALJ can determine if discovery is needed for a party to determine whether genuine issues of material fact exist.

Under the previous Rule 602(h)(2)(iii), the ALJ could certify an offer of settlement or part of any offer of settlement even if the settlement contained genuine issues of material fact. In these circumstances, the ALJ was entitled to certify an offer that is contested by a party if all of the following conditions, contained in subparts (A), (B), and (C), were met:

(A) The parties concur on a motion for omission of the initial decision as provided in Rule 710;

(B) The presiding officer determines that the record contains substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues; and

(C) The parties have an opportunity to avail themselves of their rights with respect to the presentation of evidence and cross-examination of opposing witnesses.

If any one of these conditions was not present, the judge could direct further procedures as deemed appropriate, including certification of the settlement at a later time if the conditions were then met.

The NOPR proposed to modify the regulations to permit the ALJ to certify a settlement if there is less than unanimous concurrence of the parties under condition (A) to a motion filed under Rule 710 for omission of the initial decision. To accomplish this, the NOPR proposed to amend both condition (A) and Rule 710 to delegate to the ALJ the authority to determine that, if a motion filed under Rule 710 has less than unanimous concurrence, omission of the initial decision is appropriate to the same extent the Commission is able to make that determination under Rule 710. The NOPR concluded that condition (C) is subsumed by condition (B) and

[54] Natural Gas Clearinghouse at 3–7.

[55] Arkla Energy Resources, 48 FERC ¶ 61,602, *reh'g denied*, 49 FERC ¶ 61,051 (1989).

[56] Tejas Power Co. v. FERC, 908 F.2d 998 (D.C. Cir. 1990).

[57] Columbia Gas Transmission Corp., 64 FERC ¶ 61,366, *reh'g denied and order clarified*, 66 FERC ¶ 61,214 (1994); Southern Natural Gas Co., 67 FERC ¶ 61,156 (1994), *appeal docketed*, Mississippi Valley Gas Co. v. FERC, No. 94–1486 (D.C. Cir. filed July 1, 1994).

[58] United Municipal Distribution Group v. FERC, 732 F.2d 102 (D.C. Cir. 1984).

[59] Arkla Energy Resources, 48 FERC ¶ 61,602 at p. 61,303, *reh'g denied*, 49 FERC ¶ 61,051 (1989).

[60] PEC Pipeline Group at 7.

[61] Columbia Gas Transmission Corp., 64 FERC ¶ 61,366, *reh'g denied and order clarified*, 66 FERC ¶ 61,214 (1994); Southern Natural Gas Co., 67 FERC ¶ 61,156 (1994).

[62] Industrials at 12.

[63] Natural Gas Clearinghouse at 7–8.

[64] AGD at 6; Electric Generation at 12; Natural Gas Supply at 4.

proposed to eliminate condition (C) entirely.

Natural Gas Pipeline submits that the ALJ should certify to the Commission a settlement that is sponsored or supported by the applicant and also has substantial support among other participants. It maintains that the Commission, not the ALJ, is better able to decide policy issues, decide whether the record is adequate, establish special procedures, and effect severance procedures.[65]

The ALJ is best suited to rule in the first instance about whether a settlement should be certified and, if not, what procedures should be pursued. Natural's approach in essence would limit the ALJs to record fashioners only.

The Industrials maintain that the ALJs are better equipped than the Commission to sift through a record to find facts and that the initial decision process is not a roadblock. At a minimum, they assert the Commission should clarify that omission of the initial decision is discretionary.[66] Omission of an initial decision is only mandatory if all parties join or concur in the motion.

Natural Gas Supply is concerned about the lack of standards on omission of an initial decision in Rules 602(h)(2)(iii)(A) and 710.[67] The Commission concludes that those sections should be applied on a case-specific basis.

Natural Gas Supply maintains that the existence of record evidence is unrelated to the credibility of the evidence and that a mini-hearing should not be a material imposition on the parties or the fact finder. Northern Distributors also opposes the deletion of the right to cross-examination, which it says will not be inconsistent with the use of affidavits because it will allow the testing of and developing of assertions in the affidavits.[68] Northeast and New Jersey also oppose the limits on cross-examination because, they contend, that is the only true test of contested facts. They also oppose the proposed limit on an opportunity to present evidence.[69]

The commenters are incorrect in their view that the Commission has limited the opportunity to present evidence and to cross-examine witnesses. The Commission has merely eliminated previous Rule 602(h)(2)(iii)(C) because it is subsumed within subsection (B)'s requirement of substantial evidence. The ALJ will have to determine whether a party is entitled to present evidence and to cross-examine witnesses when the determination is made concerning whether the ''record contains substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues.'' [70] In this vein, the Commission emphasizes that substantial evidence pertains to the quality and not the quantity of the evidence; evidence elicited through cross-examination of witnesses may be necessary and appropriate in some instances but not in others.

The Industrials ask the Commission to clarify the role of the trial staff in prehearing and settlement discussions and during and after any hearings are held for severed parties or on severed issues. They state that the trial staff is an advocate of the public interest with an independent position of its own and should continue to participate in hearings on the merits even if it supports a settlement. They argue that the staff should not be permitted to withhold its witnesses or withdraw its testimony during contested party litigation.[71]

The rule adopts nothing that affects the trial staff's role in proceedings. It is well settled that trial staff members can not be required to testify on behalf of a private litigant.[72] The trial staff often acts as an informal mediator, although it is not a pure neutral in that it can also advance a position on the merits. Continued litigation of unsettled issues may or may not be in the public interest, depending on the circumstances presented. There is often a public interest benefit in avoiding the societal cost of continued litigation. In those circumstances, the trial staff may decide that it can best serve the public interest by supporting a settlement rather than proceeding with litigation of unresolved issues.

The PEC Pipeline Group maintains that the Commission should modify the settlement regulations so that only parties with a direct economic interest in the outcome of a proceeding have standing to contest a settlement.[73] We will not curtail the rights of parties to oppose a settlement based on their degree of economic interest in the outcome. Such parties have a right to their day in court regardless of their economic stake in the outcome.

The Industrials maintain that to avoid ''settlement by ambush,'' the Commission should require settlement sponsors to hold at least one formal settlement conference for outlining or summarizing the settlement and to answer questions before a settlement is filed. They add that a failure to do so should be deemed ''bad faith.'' [74]

The Commission sees no reason to require a formal settlement conference in each case. Whether a conference should be convened is a case-specific matter to be determined by the decisional authority on a case by case basis.[75] It might be appropriate only in those instances when not all of the parties have been involved in the settlement negotiation process. In those circumstances, there may be a reason to believe, based on the record developed to that point, that the settlement might be opposed. If, however, all of the parties have been invited to participate in the settlement process then there would be no purpose to requiring yet another meeting.[76]

The Industrials maintain that, in light of the affidavit process, the Commission should either (1) modify the time periods for initial comments and reply comments to 45 and 30 days, respectively, or (2) give the ALJs the authority to modify the time requirements. They contend in the alternative that ''if one or more parties claims to have been unfairly excluded from the settlement process, those parties should be entitled to move at any time for a settlement judge to preside over further proceedings. In such a situation, the dates for comments on the settlement, as provided under Rule 602(f), should automatically be suspended.'' [77] The Commission believes that the current rules about settlements provide the ALJs with adequate authority to act on any requests for extensions of time (Rule

[65] Natural Gas Pipeline at 4–7.

[66] Industrials at 21–23.

[67] Natural Gas Supply at 4.

[68] Northern Distributors at 6–8.

[69] Northeast and New Jersey at 3–4.

[70] Rule 602(h)(2)(iii)(B).

[71] Industrials at 14.

[72] *See* United Gas Pipe Line Company, 47 FERC ¶ 61,035 (1989); *cf.* Southern Natural Gas Company, 10 FERC ¶ 61,287 at p. 61,577 (1988).

[73] PEC Pipeline Group at 4–6. The PEC Pipeline Group also maintains that the Commission should not permit an ALJ to certify a settlement ''unless, at a minimum, the contested settlement is sponsored and supported by the primary party.'' We prefer to leave this to the discretion of the ALJs.

[74] Industrials at 15.

[75] *See* Rule 601(a).

[76] In rate cases, for instance, the trial staff initiates settlement discussions by the filing of top sheets which are followed by settlement conferences where all parties are invited to attend. If the discussions held at these conferences suggest that a settlement is obtainable, further settlement conferences are held. In all other cases, the trial staff explores with the parties whether settlement discussions should be pursued. If settlement discussions are held, no party is kept out of the process. There may be occasions, however, when smaller meetings with selected parties are held to advance settlement.

[77] Industrials at 23–24.

602(f)(2)) or for a settlement judge (Rule 603).

Natural Gas Supply suggests other steps to more efficiently resolve rate matters. It recommends (1) requiring the filing of Statement P with the case itself, (2) requiring staff to timely prepare and submit top sheets, and (3) appointing a settlement judge for each new rate filing.[78] These matters fall beyond the scope of this proceeding. For example, the Commission is proposing in another rulemaking to require the submission of Statement P with a rate filing.[79]

Finally, the Industrials ask us to codify the procedures for technical conferences. That is also a matter that is beyond the scope of this rulemaking.[80]

V. Miscellaneous

A. ADR in Oil Pipeline Rate Proceedings

Section 1802(e) of the Energy Policy Act of 1992 [81] required the Commission, to the maximum extent practicable, to establish ADR procedures in oil pipeline rate proceedings including required negotiations and voluntary arbitration for use early in contested rate proceedings. In Order No. 561,[82] the Commission established ADR and arbitration procedures for oil pipelines at § 343.5 of its regulations. Those provisions are much the same as the ADR rules proposed in the ADR NOPR in the instant proceeding except for a provision that requires the Commission to refer all protested oil pipeline rate filings to a settlement judge for recommended resolution.

The NOPR asked for comments on whether to integrate the oil pipeline provisions into the proposed ADR rules so that the Commission would then have a single set of ADR rules. The Association of Oil Pipelines (AOPL) supports integration but claims that the prohibitions against judicial review in the proposed rules are not included in the oil pipeline ADR rules and thus should not be made applicable to oil pipelines in the final rules here. The PEC Pipeline Group observes that the Congressional mandate for required negotiation does not apply to gas pipelines and therefore that the required negotiation approach is inappropriate in the gas pipeline context.[83]

The Commission concludes that it would be more efficient and less confusing for all participants in Commission proceedings to have a single set of ADR rules. The Commission thus will make the ADR rules adopted here applicable to oil pipelines. The Commission disagrees with AOPL's position on judicial review because we did not intend special judicial review provisions for oil pipelines,[84] and thus will not exclude oil pipelines from the provisions adopted here regarding judicial review. The Commission agrees, however, that negotiation should not be required other than for oil pipelines and thus will make the required negotiation provision currently in the oil pipeline ADR rules applicable only to oil pipelines. Therefore, we are deleting most of § 343.5 of the Commission's regulations, except for the required negotiation provision previously at § 343.5(b), which is now renumbered simply as § 343.5. We are also deleting some of the related definitions in § 343.1.

B. ADR and Other Agencies

The U.S. Departments of Commerce [85] and the Interior generally support the use of ADR, but Interior expresses concern over how those Departments' statutory functions in the hydropower licensing process will be protected and integrated in the ADR process.

Section 4(e) of the Federal Power Act (FPA) requires that Commission licenses for projects located within United States reservations must include all conditions that the Secretary of the department under whose supervision the reservation falls shall deem necessary for the adequate protection and utilization of such reservation.[86] Section 18 of the FPA requires the Commission to require the licensee to provide ''such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce.'' [87] Interior also refers to section 30(c) of the FPA,[88] which requires the Commission to include fish and wildlife protective conditions in exemptions from licenses when those Departments so mandate, and to section 7(a)(2) of the Endangered Species Act,[89] which requires certain consultation with Interior's U.S. Fish and Wildlife Service. We also note that section 10(j) of the FPA,[90] in conjunction with the Fish and Wildlife Coordination Act,[91] mandates consultation with both Commerce and Interior on fish and wildlife mitigation conditions in Licenses.

We assure both Departments that their statutory authority and responsibilities will not be impaired. The ADR rules are not intended, nor could they be lawfully construed, to in any way waive, evade, or undermine any agency's statutory rights or responsibilities. Having rendered that categorical assurance, we urge both Commerce and Interior to join us in devising ways to integrate the conduct of their statutory functions under the FPA with the Commission's. In particular, we encourage Commerce and Interior to participate early and actively in consultative, ADR, or any other informal fora for discussing environmental problems and potential mitigatory and enhancement measures with license applicants, other interested persons, and (where appropriate) our staff, in an effort to resolve these matters as early, cooperatively and efficiently as possible.[92]

The Colorado River Energy Distributors Association (CREDA) comment on the use of ADR techniques in the context of requests by Federal Power Marketing Agencies (PMA's) for confirmation and approval of rates proposed for the sale of power from federally-owned projects.

CREDA asserts that PMA rate proceedings at the Commission lend themselves especially well to ADR proceedings. CREDA cites the Commission's traditional advisory role in deciding whether to confirm and approve PMA rates, and maintains that this role would be greatly enhanced by the availability of ADR. CREDA further cites the sometimes conflicting goals of the PMA's, the customers of PMA's, and the federal power generating agencies that are charged with recovery of the costs of operating the projects. CREDA concludes that in light of these conflicting interests and the numerous complex issues involved in PMA rate proceedings, informal resolution of these issues through ADR proceedings

[78] Natural Gas Supply at 5–7.

[79] Filings and Reporting Requirements for Interstate Natural Company Rate Schedules and Tariff, 60 FR 311 (Jan. 13, 1995), IV FERC Stats. & Regs. Proposed Regulations ¶ 32,511 (Dec. 16, 1994).

[80] Industrials at 23–24.

[81] *See* 42 U.S.C.A. 7172 note (West Supp. 1993).

[82] Revisions to Oil Pipeline Regulations pursuant to the Energy Policy Act of 1992, Order No. 561, 58 FR 58785 (November 4, 1993), III FERC Stats. & Regs. ¶ 30, 985 (1993), *order on reh'g and clarification*, Order No. 561–A, 59 FR 40243 (August 8, 1994), III FERC Stats. & Regs. ¶ 31,000 (1994).

[83] PEC Pipeline Group at 16–17.

[84] *See*, for example, Order No. 561 at 30,974, where the Commission specifically provided: ''A decision by the Commission to vacate an arbitration award would not be subject to judicial review.''

[85] The comments of the Department of Commerce were submitted by its National Marine Fisheries Service.

[86] 16 U.S.C. 797(e).

[87] 16 U.S.C. 811.

[88] 16 U.S.C. 823a(c).

[89] 16 U.S.C. 1536(a)(2).

[90] 16 U.S.C. 803(j).

[91] 16 U.S.C. 661 *et seq.*

[92] We are not willing to adopt Interior's suggestion that State and Federal resource agencies be accorded the power to, in effect, veto the use of ADR procedures in hydropower license cases. The statutory rights of the resource agencies can be adequately protected without precluding all of the other interested participants in the process from meeting and trying to resolve their differences through use of ADR procedures.

could greatly reduce the Commission's workload in PMA rate proceedings.

CREDA generally supports the Commission's proposals to incorporate use of ADR. CREDA recognizes that § 300.1(a) of Part 300 of the Commission's regulations already specifically states that, except as otherwise provided by rule or order, the Commission's Rules of Practice and Procedure apply to filings by PMA's in which confirmation and approval is sought for proposed rates. CREDA nevertheless recommends, out of an abundance of caution, that the Commission specifically state in its regulations concerning Commission consideration of PMA rate filings that ADR is available upon Commission order. It is not necessary, however, to make specific provision for ADR in the regulations concerning PMA rate filings because § 300.1(a) makes the Rules of Practice and Procedure generally applicable to all PMA rate proceedings under Part 300.

VI. Administrative Findings

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[93] generally requires the Commission to describe the impact that a rule will have on small entities or to certify that the rule will not have a significant economic impact on a substantial number of small entities. The Commission is not required to make an analysis if a rule will not have such an impact.[94]

Pursuant to section 605(b) of the RFA, the Commission certifies that the Final Rule adopted herein will not have a significant economic impact on a substantial number of small entities.

B. Environmental Review

The Commission is not preparing an environmental assessment or environmental impact statement in this proceeding because the new rules and amendments are procedural only, changing only the Commission's Rules of Practice and Procedure, and therefore have no significant effect on the human environment.[95]

C. Information Collection Requirements

Office of Management and Budget (OMB) regulations require OMB to approve certain information collection requirements imposed by agency rules.[96] However, this Final Rule contains no new information collection requirements in part 385 and therefore is not subject to OMB approval.

VII. Effective Date

This rule is effective May 19, 1995.

List of Subjects

18 CFR Part 343

Pipelines, Reporting and recordkeeping requirements.

18 CFR Part 385

Administrative practice and procedure, Electric power, Penalties, Pipelines, Reporting and recordkeeping requirements.

By the Commission.

Lois D. Cashell,

Secretary.

In consideration of the foregoing, the Commission amends parts 343 and 385, Chapter I, Title 18, Code of Federal Regulations, as set forth below.

PART 343—PROCEDURAL RULES APPLICABLE TO OIL PIPELINE PROCEEDINGS

1. The authority citation for part 343 is revised to read as follows:

Authority: 5 U.S.C. 571–583; 42 U.S.C. 7101–7352; 49 U.S.C. 60502; 49 App. U.S.C. 1-85.

§ 343.1 [Amended]

2. In § 343.1, paragraphs (a), (b), (d), (e), (f), (g) and (h) are removed, and paragraphs (c) and (i) are redesignated as paragraphs (a) and (b), respectively.

3. § 343.5 is revised to read as follows:

§ 343.5 Required negotiations.

The Commission or other decisional authority may require parties to enter into good faith negotiations to settle oil pipeline rate matters. The Commission will refer all protested rate filings to a settlement judge pursuant to § 385.603 of this chapter for recommended resolution. Failure to participate in such negotiations in good faith is a ground for decision against the party so failing to participate on any issue that is the subject of negotiation by other parties.

PART 385—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 385 continues to read as follows:

Authority: 5 U.S.C. 551–557; 15 U.S.C. 717–717z, 3301–3432; 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352; 49 U.S.C. 60502; 49 App. U.S.C. 1–85.

2. In § 385.503, paragraph (a) is revised to read as follows:

§ 385.503 Consolidation, severance and extension of close-of-record date by Chief Administrative Law Judge (Rule 503).

(a) The Chief Administrative Law Judge may, on motion or otherwise, order proceedings pending under this subpart consolidated for hearing on, or settlement of, any or all matters in issue in the proceedings, or order the severance of proceedings or issues in a proceeding. The order may be appealed to the Commission pursuant to Rule 715.

* * * * *

3. In § 385.504, paragraph (b)(7) is revised to read as follows:

§ 385.504 Duties and powers of presiding officers (Rule 504).

* * * * *

(b) *Powers.* * * *

(7) Hold conferences of the participants, as provided in Subpart F of this part, including for the purpose of considering the use of alternative dispute resolution procedures;

* * * * *

4. In § 385.601, paragraph (a) is revised to read as follows:

§ 385.601 Conferences (Rule 601).

(a) *Convening.* The Commission or other decisional authority, upon motion or otherwise, may convene a conference of the participants in a proceeding at any time for any purpose related to the conduct or disposition of the proceeding, including submission and consideration of offers of settlement or the use of alternative dispute resolution procedures.

* * * * *

5. In § 385.602, paragraphs (b)(3) and (f)(4) are added and paragraphs (h)(1)(ii) introductory text, (h)(1)(iii), (h)(2)(iii), and (h)(2)(iv) are revised to read as follows:

§ 385.602 Submission of settlement offers (Rule 602).

* * * * *

(b) *Submission of offer.* * * *

(3) If an offer of settlement pertains to multiple proceedings that are in part pending before the Commission and in part set for hearing, any participant may by motion request the Commission to consolidate the multiple proceedings and to provide any other appropriate procedural relief for purposes of disposition of the settlement.

* * * * *

(f) *Comments.* * * *

(4) Any comment that contests an offer of settlement by alleging a dispute as to a genuine issue of material fact

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[93] 5 U.S.C. 601–612.

[94] 5 U.S.C. 605(b).

[95] Section 380.4(a)(2)(ii) of the Commission's regulations categorically exempts from environmental review Commission proposals for promulgation of rules that are clarifying, corrective, or procedural, or that do not substantially change the effect of the regulations being amended. *See* 18 CFR 380.4(a)(2)(ii).

[96] 5 CFR 1320.13.

must include an affidavit detailing any genuine issue of material fact by specific reference to documents, testimony, or other items included in the offer of settlement, or items not included in the settlement, that are relevant to support the claim. Reply comments may include responding affidavits.

* * * * *

(h) *Contested offers of settlement.*

(1) * * *

(ii) If the Commission finds that the record lacks substantial evidence or that the contesting parties or contested issues can not be severed from the offer of settlement, the Commission will:

* * * * *

(iii) If contesting parties or contested issues are severable, the contesting parties or uncontested portions may be severed. The uncontested portions will be decided in accordance with paragraph (g) of this section.

(2) * * *

(iii) Any offer of settlement or part of any offer may be certified to the Commission, if:

(A) The parties concur on a motion for omission of the initial decision as provided in Rule 710, or, if all parties do not concur in the motion, the presiding officer determines that omission of the initial decision is appropriate under Rule 710(d), and

(B) The presiding officer determines that the record contains substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues.

(iv) If any contesting parties or contested issues are severable, the uncontested portions of the settlement may be certified immediately by the presiding officer to the Commission for decision, as provided in paragraph (g) of this section.

* * * * *

6. In Subpart F, §§ 385.604 through 385.606 are added to read as follows:

§ 385.604 Alternative means of dispute resolution (Rule 604).

(a) *Applicability.* (1) Participants may, subject to the limitations of paragraph (a)(2) of this section, use alternative means of dispute resolution to resolve all or part of any pending matter if the participants agree. The alternative means of dispute resolution authorized under Subpart F of this part will be voluntary procedures that supplement rather than limit other available dispute resolution techniques.

(2) Except as provided in paragraph (a)(3) of this section, the decisional authority will not consent to use of an alternative dispute resolution proceeding if:

(i) A definitive or authoritative resolution of the matter is required for precedential value;

(ii) The matter involves or may bear upon significant questions of policy that require additional procedures before a final resolution may be made, and the proceeding would not likely serve to develop a recommended policy;

(iii) Maintaining established policies is of special importance;

(iv) The matter significantly affects persons or organizations who are not parties to the proceeding;

(v) A full public record of the proceeding is important, and a dispute resolution proceeding cannot provide a record; or

(vi) The Commission must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the Commission's fulfilling that requirement.

(3) If one or more of the factors outlined in paragraph (a)(2) of this section is present, alternative dispute resolution may nevertheless be used if the alternative dispute resolution proceeding can be structured to avoid the identified factor or if other concerns significantly outweigh the identified factor.

(4) A determination to use or not to use a dispute resolution proceeding under Subpart F of this part is not subject to judicial review.

(5) Settlement agreements reached through the use of alternative dispute resolution pursuant to Subpart F of this part will be subject to the provisions of Rule 602, unless the decisional authority, upon motion or otherwise, orders a different procedure.

(b) *Definitions.* For the purposes of Subpart F of this part:

(1) *Alternative means of dispute resolution* means any procedure that is used, in lieu of an adjudication, to resolve issues in controversy, including but not limited to, settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, or any combination thereof;

(2) *Award* means any decision by an arbitrator resolving the issues in controversy;

(3) *Dispute resolution communication* means any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or non-party participant. A written agreement to enter into a dispute resolution proceeding, or a final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication;

(4) *Dispute resolution proceeding* means any alternative means of dispute resolution that is used to resolve an issue in controversy in which a neutral may be appointed and specified parties participate;

(5) *In confidence* means information is provided:

(i) With the expressed intent of the source that it not be disclosed, or

(ii) Under circumstances that create a reasonable expectation on behalf of the source that the information will not be disclosed;

(6) *Issue in controversy* means an issue which is or is anticipated to be material to a decision in a proceeding before the Commission and which is the subject of disagreement between participants who would be substantially affected by the decision or between the Commission and any such participants;

(7) *Neutral* means an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy;

(8) *Participants* in a dispute resolution proceeding that is used to resolve an issue in controversy in a proceeding involving an application for a license or exemption to construct, operate, and maintain a hydroelectric project pursuant to the Federal Power Act or the Public Utility Regulatory Policies Act shall include such state and federal agencies and Indian tribes as have statutory roles or a direct interest in such hydroelectric proceedings.

(c) *Neutrals.* (1) A neutral may be a permanent or temporary officer or employee of the Federal Government (including an administrative law judge), or any other individual who is acceptable to the participants to a dispute resolution proceeding. A neutral must have no official, financial, or personal conflict of interest with respect to the issues in controversy, except that a neutral who is not a government employee may serve if the interest is fully disclosed in writing to all participants and all participants agree.

(2) A neutral serves at the will of the participants, unless otherwise provided.

(3) Neutrals may be selected from among the Commission's administrative law judges or other employees, from rosters kept by the Federal Mediation and Conciliation Service, the Administrative Conference of the United States, the American Arbitration Association, or from any other source.

(d) *Submission of proposal to use alternative means of dispute resolution.* (1) The participants may at any time submit a written proposal to use

alternative means of dispute resolution to resolve all or part of any matter in controversy or anticipated to be in controversy before the Commission.

(2) For matters set for hearing under Subpart E of this part, a proposal to use alternative means of dispute resolution other than binding arbitration must be filed with the presiding administrative law judge.

(3) A proposal to use binding arbitration must be filed with the Secretary for consideration by the Commission.

(4) For all other matters, a proposal to use alternative means of dispute resolution may be filed with the Secretary for consideration by the appropriate decisional authority.

(5) The appropriate decisional authority will issue an order, approving or denying, under the guidelines in Rule 604(a) (2) and (3), a proposal to use alternative means of dispute resolution. Denial of a proposal to use alternative dispute resolution will be in the form of an order and will identify the specific reasons for the denial. A proposal to use alternative dispute resolution is deemed approved unless an order denying approval is issued within 30 days after the proposal is filed.

(6) Any request to modify a previously-approved ADR proposal must follow the same procedure used for the initial approval.

(e) *Contents of proposal.* A proposal to use alternative means of dispute resolution must be in writing and include:

(1) A general identification of the issues in controversy intended to be resolved by the proposed alternative dispute resolution method,

(2) A description of the alternative dispute resolution method(s) to be used,

(3) The signatures of all participants or evidence otherwise indicating the consent of all participants; and

(4) A certificate of service pursuant to Rule 2010(h).

(f) *Monitoring the alternative dispute resolution proceeding.* The decisional authority may order reports on the status of the alternative dispute resolution proceeding at any time.

(g) *Termination of alternative dispute resolution proceeding.* (1) The decisional authority, upon motion or otherwise, may terminate any alternative dispute resolution proceeding under Rule 604 or 605 by issuing an order to that effect.

(2) A decision to terminate an alternative dispute resolution proceeding is not subject to judicial review.

§ 385.605 Arbitration (Rule 605).

(a) *Authorization of arbitration.* (1) The participants may at any time submit a written proposal to use binding arbitration under the provisions of Rule 605 to resolve all or part of any matter in controversy, or anticipated to be in controversy, before the Commission.

(2) The proposal must be submitted as provided in Rule 604(d).

(3) The proposal must be in writing and contain the information required in Rule 604(e).

(4) An arbitration proceeding under this rule may be monitored and terminated as provided in Rule 604 (d) and (g).

(5) No person may be required to consent to arbitration as a condition of entering into a contract or obtaining a benefit. All interested parties must expressly consent before arbitration may be used.

(b) *Arbitrators.* (1) The participants to an arbitration proceeding are entitled to select the arbitrator.

(2) The arbitrator must be a neutral who meets the criteria of a neutral under Rule 604(c).

(c) *Authority of arbitrator.* An arbitrator to whom a dispute is referred under this section may:

(1) Regulate the course of and conduct arbitral hearings;

(2) Administer oaths and affirmations;

(3) Compel the attendance of witnesses and the production of evidence to the extent the Commission is authorized by law to do so; and

(4) Make awards.

(d) *Arbitration proceedings.* (1) The arbitrator will set a time and place for the hearing on the dispute and must notify the participants not less than 5 days before the hearing.

(2) Any participant wishing that there be a record of the hearing must:

(i) Prepare the record;

(ii) Notify the other participants and the arbitrator of the preparation of the record;

(iii) Furnish copies to all identified participants and the arbitrator; and

(iv) Pay all costs for the record, unless the participants agree otherwise or the arbitrator determines that the costs should be apportioned.

(3) (i) Participants to the arbitration are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing to the same extent as in a proceeding under Subpart E of this part;

(ii) The arbitrator may, with the consent of the participants, conduct all or part of the hearing by telephone, television, computer, or other electronic means, if each participant has an opportunity to participate.

(iii) The hearing must be conducted expeditiously and in an informal manner.

(iv) The arbitrator may receive any oral or documentary evidence, except that irrelevant, immaterial, unduly repetitious, or privileged evidence may be excluded by the arbitrator.

(v) The arbitrator will interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives.

(4) No interested person will make or knowingly cause to be made to the arbitrator an unauthorized *ex parte* communication relevant to the merits of the proceeding, unless the participants agree otherwise. If a communication is made in violation of this prohibition, the arbitrator will ensure that a memorandum of the communication is prepared and made a part of the record, and that an opportunity for rebuttal is allowed. Upon receipt of such communication, the arbitrator may require the offending participant to show cause why the claim of the participant should not be resolved against the participant as a result of the improper conduct.

(5) The arbitrator will make the award within 30 days after the close of the hearing or the date of the filing of any briefs authorized by the arbitrator, whichever date is later, unless the participants and the arbitrator agree to some other time limit.

(e) *Arbitration awards.* (1)(i) The award in an arbitration proceeding under Subpart F of this chapter will include a brief, informal discussion of the factual and legal basis for the award.

(ii) The prevailing participants must file the award with the Commission, along with proof of service on all participants.

(2) The award in an arbitration proceeding will become final 30 days after it is filed, unless the award is vacated. The Commission, upon motion or otherwise, may extend the 30-day period for one additional 30-day period by issuing a notice of the extension before the end of the first 30-day period.

(3) A final award is binding on the participants to the arbitration proceeding.

(4) An award may not serve as an estoppel in any other proceeding for any issue that was resolved in the proceeding. The award also may not be used as precedent or otherwise be considered in any factually unrelated proceeding or in any other arbitration proceeding.

(f) *Vacating an award.* (1) Within 10 days after the award is filed, any person may file a request with the Commission to vacate an arbitration award and must

serve the request to vacate on all participants. Responses to such a request are due 10 days after the request is filed.

(2) Upon request or otherwise, the Commission may vacate any award issued under this rule before the award becomes final by issuing an order to that effect, in which case the award will be null and void.

(3) Rule 2202 regarding separation of functions applies with respect to a decision to vacate an arbitration award.

(4) If the Commission vacates an award under paragraph (f)(3) of this section, a party to the arbitration may, within 30 days of the action, petition the Commission for an award of attorney fees and expenses incurred in connection with the arbitration proceeding. The Commission will award the petitioning party those fees and expenses that would not have been incurred in the absence of the arbitration proceeding, unless the Commission finds that special circumstances make the award unjust. The fees and expenses awarded will be paid by the Commission.

(5) An arbitration award vacated under this paragraph will not be admissible in any proceeding relating to the issues in controversy with respect to which the award was made.

(6) A decision by the Commission to vacate an arbitration award is not subject to rehearing or judicial review.

§ 385.606 Confidentiality in dispute resolution proceedings (Rule 606).

(a) Except as provided in paragraphs (d) and (e) of this section, a neutral in a dispute resolution proceeding shall not voluntarily disclose, or through discovery or compulsory process be required to disclose, any information concerning any dispute resolution communication or any communication provided in confidence to the neutral, unless:

(1) All participants in the dispute resolution proceeding and the neutral consent in writing;

(2) The dispute resolution communication has otherwise already been made public;

(3) The dispute resolution communication is required by statute to be made public, but a neutral should make the communication public only if no other person is reasonably available to disclose the communication; or

(4) A court determines that the testimony or disclosure is necessary to:

(i) Prevent a manifest injustice;

(ii) Help establish a violation of law; or

(iii) Prevent harm to the public health or safety of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of participants in future cases that their communications will remain confidential.

(b) A participant in a dispute resolution proceeding shall not voluntarily disclose, or through discovery or compulsory process be required to disclose, any information concerning any dispute resolution communication, unless:

(1) All participants to the dispute resolution proceeding consent in writing;

(2) The dispute resolution communication has otherwise already been made public;

(3) The dispute resolution communication is required by statute to be made public;

(4) A court determines that the testimony or disclosure is necessary to:

(i) Prevent a manifest injustice;

(ii) Help establish a violation of law; or

(iii) Prevent harm to the public health and safety of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of participants in future cases that their communications will remain confidential; or

(5) The dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of the agreement or award.

(c) Any dispute resolution communication that is disclosed in violation of paragraphs (a) or (b) of this section shall not be admissible in any proceeding.

(d) The participants may agree to alternative confidential procedures for disclosures by a neutral. The participants must inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of paragraph (a) of this section that will govern the confidentiality of the dispute resolution proceeding. If the participants do not so inform the neutral, paragraph (a) of this section shall apply.

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a participant regarding a dispute resolution communication, the participant will make reasonable efforts to notify the neutral and the other participants of the demand. Any participant who receives the notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information waives any objection to the disclosure.

(f) Nothing in Rule 606 prevents the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding. See sections 385.410 and 388.112 of this chapter.

(g) Paragraphs (a) and (b) of this section do not preclude disclosure of information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.

(h) Paragraphs (a) and (b) of this section do not prevent the gathering of information for research and educational purposes, in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the participants and the specific issues in controversy are not identifiable.

(i) Paragraphs (a) and (b) of this section do not prevent use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a participant in the proceeding, so long as the communication is disclosed only to the extent necessary to resolve the dispute.

(j) Nothing in this section precludes parties from seeking privileged treatment for documents under section 388.112 of this chapter.

(k) Where disclosure is authorized by this section, nothing in this section precludes use of a protective agreement or protective orders.

7. In § 385.710, paragraph (d) is added to read as follows:

§ 385.710 Waiver of the initial decision (Rule 710).

* * * * *

(d) *Waiver by presiding officer.* A motion for waiver of the initial decision, requested for the purpose of certification of a contested settlement pursuant to Rule 602(h)(2)(iii)(A), may be filed with, and decided by, the presiding officer. If all parties join in the motion, the presiding officer will grant the motion. If not all parties join in the motion, the motion is denied unless the presiding officer grants the motion within 30 days of filing the written motion or presenting an oral motion. The contents of any motion filed under paragraph (d) of this section must comply with the requirements in paragraph (b) of this section. A motion may be oral or written, and may be made whenever appropriate for the consideration of the presiding officer.

Note.—This appendix will not be published in the Code of Federal Regulations.

Appendix

Alternative Dispute Resolution

Docket No. RM91–12–000

Commenters

American Gas Distributors (AGD)
American Public Power Association
Association of Oil Pipelines (AOPL)
Colorado Interstate Gas Company and ANR Pipeline Company (CIG and ANR)
Colorado River Energy Distributors Association (CREDA)
Columbia Gas Transmission Corporation and Columbia Gulf Transmission Company (Columbia Gas)
Consumers Power Company (Consumers)
Edison Electric Institute (EEI)
Electric Generation Association (Electric Generation)
McCormack Institute of Public Affairs
Missouri Public Service Commission (Missouri PSC)
Natural Gas Clearinghouse
Natural Gas Pipeline Company of America (Natural Gas Pipeline)
Natural Gas Supply Association (Natural Gas Supply)
New England Power Service
Northeast Energy Associates and North Jersey Energy Associates (Northeast and North Jersey)
Northern Distributors Group (Northern Distributors)
Northwest Industrial Gas Users (Northwest Users)
Pacific Gas and Electric Company (PG&E)
Process Gas Consumers Group, American Iron and Steel Institute, and Georgia Industrial Group (Industrials)
Texas Eastern Transmission Corporation, Panhandle Eastern Pipe Line Company, Trunkline Gas Company and Algonquin Gas Transmission Company (PEC Pipeline Group)
Transcontinental Gas Pipe Line Corporation (Transco)
U.S. Department of Commerce (Commerce)
U.S. Department of the Interior (Interior)
Williams Natural Gas Company and Northwest Pipeline Company (Williams)
Wisconsin Municipal Group

[FR Doc. 95–9594 Filed 4–18–95; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1310

[DEA No. 128F]

RIN 1117–AA26

Records, Reports, and Exports of Listed Chemicals

AGENCY: Drug Enforcement Administration (DES), Justice.

ACTION: Final rule.

SUMMARY: This final rule adds methyl isobutyl ketone (MIBK) as a List II Chemical under the Controlled Substances Act (CSA). This action is based on substantial evidence that MIBK is increasingly being used as a solvent in the production of cocaine hydrochloride during the conversion of cocaine base to cocaine hydrochloride. The recent steps by the Government of Columbia (GOC) to control MIBK further support this action.

This action will only affect specific types of transactions which are greater than 500 gallons or 1523 kilograms of MIBK destined for countries in the Western Hemisphere (with the exception of transactions destined for Canada). These transactions include (1) export transactions; (2) international transactions in which a U.S. broker or trader participates; and (3) transshipments through the U.S.

EFFECTIVE DATE: May 19, 1995.

FOR FURTHER INFORMATION CONTACT: Howard McClain Jr., Chief, Drug and Chemical Evaluation Section, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537 at (202) 307–7183.

SUPPLEMENTARY INFORMATION: The Controlled Substances Act (CSA). specifically 21 U.S.C. section 802, provides the Attorney General with the authority to specify by regulation, additional precursor and essential chemicals as ''listed chemicals'' if they are used in the illicit manufacture of controlled substances. Section 802(39) also provides the Attorney General with authority to establish a threshold amount for ''listed chemicals'' if the Attorney General so elects. This authority has been delegated to the Administrator of DEA by 28 CFR 0.100 and redelegated to the Deputy Administrator under 28 CFR 0.104 (Subpart R) Appendix Sec. 12.

On February 28, 1995 the Deputy Administrator of the Drug Enforcement Administration (DEA) published a Notice of Proposed Rulemaking (60 FR 10814). This notice proposed the addition of methyl isobutyl ketone (MIBK) as a List II Chemical under the Controlled Substances Act (CSA). Interested parties were given 30 days in which to submit comments and objections.

Only one comment was received in response to the Notice of Proposed Rulemaking. This comment requested further clarification of the meaning of the term ''Western Hemisphere''. Webster's II New Riverside University Dictionary defines the term ''Western Hemisphere'' to mean, ''The half of the earth that includes North and South America, the surrounding waters, and all neighboring islands''. For purposes of this rulemaking, this is the definition that the DEA is adopting.

While methyl ethyl ketone (MEK) has become the solvent of choice in the processing of cocaine base to cocaine hydrochloride, recent regulatory and enforcement efforts in Latin America have resulted in a reduced availability of MEK. Information available to DEA indicates that in response to this shortfall of MEK, cocaine laboratory operators have moved to the utilization of MIBK for the processing of cocaine base to cocaine hydrochloride. Due to information regarding the use of MIBK for cocaine processing, the dramatic increase in MIBK importation, and the importation of MIBK by some firms that the Government of Colombia (GOC) considers suspect, the GOC has recently taken steps to control the sale and distribution of MIBK.

The United States is a major producer of MIBK and exports MIBK to Colombia and other countries within Latin America. In light of the above, the DEA has determined that the control of MIBK as a List II Chemical under the CSA is warranted. Since the illicit use of MIBK for cocaine processing occurs in Latin America, MIBK shipments exported from the U.S., shipments transshipped or transferred through the U.S., and international transactions in which a U.S. broker or trader participates, shall be considered regulated transactions if destined for any country in the Western Hemisphere (with the exception of transactions destined for Canada) 21 U.S.C. section 802(39)(A)(iii). In addition, a threshold similar to that of MEK shall be established for MIBK. A threshold of 500 gallons (by volume) or 1523 kilograms (by weight) shall be established for MIBK. Therefore, this action will only effect specific types of transactions which are greater than 500 gallons or 1523 kilograms of MIBK destined for designated countries. These transactions include (1) export transactions; (2) international transactions in which a U.S. broker or trader participates; and (3) transshipments through the U.S. Import transactions of MIBK into the U.S. (not destined for transshipment or transfer to designated countries), and domestic transactions of MIBK are excluded from the definitions of regulated transactions contained in 21 CFR 1310.01(f) and 1313.02(d).

The Deputy Administrator hereby certifies that this rulemaking will have no significant impact upon entities whose interests must be considered under the Regulatory Flexibility Act, 5 U.S.C. 601 et seq. A review of maritime shipments of MIBK reveals that during a two year period, there were less than